PUSPAMARY ISREAL

v.

DR NAGAPAN MUTHAYA & ORS AND ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
BALIA YUSOF WAHI J
[SUIT NOS: S2-23-63-2001 & S2-23-65-2001]
6 OCTOBER 2010

TORT: *Defamation - Publication in newspaper - Allegations of misuse of co-operative funds - Whether implicating plaintiffs - Whether defence of qualified privilege applicable*

The two cases consolidated herein dealt with the plaintiffs' defamation claim against the fifth and sixth defendants. The claim against the fifth defendant, the New Straits Times Press (M) Bhd, was in respect of an article published in the New Straits Times newspaper on 15 March 2001 whilst the claim against the sixth defendant, Utusan Melayu (M) Bhd, was in respect of an article published in the Utusan Malaysia newspaper on 17 March 2001. The article by the fifth defendant alleged misuse of co-operative funds by certain office bearers of Koperasi Mahadaya Berhad ('KMB') but did not name the two plaintiffs whereas the article by the sixth defendant alleging likewise, named both the plaintiffs. Both defendants raised the defence of qualified privilege.

Held (dismissing plaintiffs' claim with costs):

(1) The words published in the fifth defendant's article did not make any reference to the two plaintiffs. Neither were they capable of being understood to refer to the two plaintiffs. On that ground alone, the plaintiffs' claim against fifth defendant ought to be dismissed. (para 10)

(2) The words published in the sixth defendant's article clearly made reference to the two plaintiffs. Any right-thinking member of the public would understand that the matter about the misappropriation of KMB's funds implicated the two named plaintiffs. (para 12)

(3) In construing the meaning of the words used, the court must do so in the context of the entirety of the contents of the publication. The plaintiff cannot pick and choose parts of the publication that are defamatory. There may be other passages in the publication that may take away the sting of the sentences considered defamatory. (para 18)

(4) The sixth defendant's article had implicated both the plaintiffs in the alleged misappropriation of KMB's funds. The plaintiffs were also portrayed as to be closely associated with KMB's chairman who had been suspended by KMB's Board of Directors. That had the tendency to expose the plaintiffs to hatred, ridicule or contempt. The words in the article would also tend to lower the plaintiffs in the estimation of right-thinking members of the society and there was a likelihood that the words would cause the plaintiffs to be shunned or avoided. The article as a whole imputed that the plaintiffs were implicated in the issue of misappropriation of KMB's funds along with the chairman and was therefore defamatory of the plaintiffs. (para 19)

(5) In determining whether a defence of qualified privilege was applicable, the three tests proposed by the English Court of Appeal in *Reynolds v. Times Newspaper Ltd* were followed. The articles published by the sixth defendant involved a cooperative society that was of public interest. Members of the public had an interest to receive the materials published and it was for the general welfare of society. The sixth defendant as a national newspaper had the moral duty to disseminate such information to the public and society in general. The sixth defendant had also acted reasonably and without malice. The evidence clearly showed that the materials published were well sourced, *ie*, from the Deputy Chairman of KMB. It was not unverified information from an unidentified or unofficial source. It was *prima facie* reliable information. The sixth defendant had, therefore, successfully put up the defence of qualified privilege. (paras 20-24)

Case(s) referred to:

Adam v. Ward [1917] AC 309 ***(refd)***

Chok Foo Choo v. The China Press Bhd. [1999] 1 CLJ 461 CA ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [1999] 7 CLJ 32 HC ***(refd)***

Edward Seaga v. Leslie Harper, Privy Council Appeal No. 90 of 2006, [2008] UKPC 9 ***(refd)***

Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors [2001] 7 CLJ 268 HC ***(refd)***

Lee Kuan Yew v. Derek Gwyn Davies & Ors [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 HC ***(refd)***

Leech v. Independent Newspaper (2007), EHC 223 ***(refd)***

Liew Poon Siak v. Low Hing King & Ors [2009] 1 LNS 1173 HC ***(refd)***

Mark Ignatius Uttley v. Wong Kam Hor & Anor [2002] 8 CLJ 628 HC ***(refd)***

Morgan v. Odhams Press Ltd [1971] 1 WLR 1239 ***(refd)***

Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***

The Institute of Commercial Management United Kingdom v. The New Straits Times Press (Malaysia) Bhd [1993] 2 CLJ 365 HC ***(refd)***

Tun Datuk Patinggi Haji Abdul Rahman Ya'akub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Other source(s) referred to:

Duncan & Neill on Defamation, 2nd edn (1983), para 14.04

Gatley on Libel and Slander, 9th edn, p 97

For the plaintiffs - M Manoharan; M/s M Manoharan & Co

For the 5th defendant - Liew Teck Huat; M/s TH Liew & Partners

For the 6th defendant - M Reza Hassan (Amira Razali & Ellia Zuraini with him); M/s Raja Riza & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Balia Yusof Wahi J:

[1] The two cases has been consolidated and heard together. In case no S-23-63-2001 the plaintiff is Puspamary a/p Isreal and in case no S-23-65-2001 the plaintiff is one Nallathambi a/l Mani. In both cases the plaintiffs' claim against the first, second, third and fourth defendants has been dealt with earlier by another judge. The present case is only against the fifth and sixth defendants.

[2] Against the fifth defendant, the New Straits Times Press (M) Bhd. the plaintiffs are claiming for damages, interest and costs in respect of an article published in the New Straits Times newspaper on 15 March 2001 while the claim against the sixth defendant, Utusan Melayu (M) Bhd. arises from an article published in the Utusan Malaysia newspaper on 17 March 2001. The plaintiffs' claim for the relief of an injunction against both the defendants has been abandoned.

[3] The article published by the fifth defendant reads as follows:

> Three report alleged misuse of co-op funds
>
> Kuala Lumpur. Wed. – Three board members of Koperasi Mahadaya Berhad have lodged a police report on the alleged misappropriation of funds amounting to millions of ringgit by certain office bearers last Sunday.
>
> The co-operative's vice president R. Danabal, recently-appointed secretary to Dr M. Nagapan and director Karumegam Achary lodged the report at the city police headquarters.
>
> They also provided the relevant minutes of previous board meetings to facilitate investigations into the alleged embezzlement of the co-operative's funds.
>
> Eight board members decided to remove and suspend three office-bearers pending the completion of police investigations into the said allegations while two others abstained.
>
> We will convene our annual general meeting in June to decide on the fate of the three office-bearers implicated in the alleged misappropriation of funds.
>
> The board also appointed Dr Safian Hussain and N. Narayanasamy as its new vice-chairmen. Dr M. Nagapan as its new secretary and P.K.S. Danabal, Aziz Saji, Sarip Abu, Phang Ming Kuang and Karumegam Achary as its directors.
>
> The co-operative is located in Wisma Methodist, Kuala Lumpur.

[4] The article published by the sixth defendant reads as follows:

KBM minta polis percepat siasatan penyelewengan RM10j

KUALA LUMPUR 16 Mac – Tabung Koperasi Mahadaya Berhad (KMB) meminta polis mempercepatkan siasatan berhubung penyelewengan lebih RM10 juta wang tabung koperasi tersebut.

Naib Pengerusinya, Danabal Raju dalam kenyataannya hari ini berkata, aduan berhubung penyelewengan yang berlaku di KMB itu telah dilaporkan kepada polis beberapa hari lalu.

Menurut beliau, pihaknya juga membuat laporan kepada Badan Pencegah Rasuah (BPR) dan Jabatan Pembangunan Koperasi selain Biro Aduan Awam Jabatan Perdana Menteri.

Beliau juga mengumumkan, Mesyuarat Lembaga Pengarah KMB pada 10 Mac lalu mengambil keputusan menggantung sementara khidmat pengerusinya, E.A. James dan digantikan dengan Dr. Safian Hussain berkuatkuasa serta-merta.

Selain itu, kata beliau, James dan dua yang lain iaitu bendahari KMB, Puspamary Isreal dan Nallathambi (salah seorang pengarah KMB) diarahkan untuk menyerahkan semua dokumen berkaitan dengan koperasi itu kepada pihak pengurusan.

KMB adalah koperasi yang terbabit dalam bidang pembangunan hartanah.

[5] Both the plaintiffs contend that the two articles published by the fifth and sixth defendants are defamatory.

[6] In so far as the claim against the fifth defendant is concerned, the plaintiffs are alleging that only the following passages are defamatory, namely:

> Eight board members decided to remove and suspend three board members pending the completion of police investigations into the said allegations while two others abstained. We will convene our annual general meeting in June to decide on the fate of the three office bearers implicated in the alleged misappropriation of funds.

[7] The fifth defendant contends that the said article is not defamatory and that the same does not even refer to the two plaintiffs. Alternatively, the fifth defendant is saying that the defence of qualified privilege applies. The sixth defendant also raises a similar defence of qualified privilege and like the fifth defendant, contends that the words published are not defamatory to the plaintiffs.

[8] The issue to be determined is whether the words contained in the said two publications are defamatory to the plaintiffs and whether the defence of qualified privilege applies to the defendants.

[9] It is trite that the plaintiffs have to prove the words or passages from the publication refer to them, the words are defamatory and that the defendants published those defamatory words or passages. It is conceded by the parties concerned in this matter that the words were published by the respective defendants in their respective newspapers.

[10] On the issue of identification or rather whether the words published refer to the plaintiffs, it is my finding that, in so far as the fifth defendant's article published in the New Straits Times newspaper on the 15 March 2001 is concerned, I do not find any evidence to support the plaintiffs' claim against the fifth defendant. As what I have stated in my judgment in another case, *Liew Poon Siak v. Low Hing King & Ors* [2009] 1 LNS 1173, it is for the plaintiff to establish objectively that he was the person referred to by the words used in the publication (See: *Lee Kuan Yew v. Derek Gwyn Davies & Ors* [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691, *The Institute of Commercial Management United Kingdom v. The New Straits Times Press (Malaysia) Bhd.* [1993] 2 CLJ 365). Are the words capable of being understood to refer to the plaintiff? The test is an objective one. The ordinary reader must be fair minded and not an avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief the words refer to the plaintiff (See also: *Morgan v. Odhams Press Ltd* [1971] 1 WLR 1239, *Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors* [2001] 7 CLJ 268).

[11] My perusal of the words published in the fifth defendant's newspaper on 15 March 2001 do not make any reference to the two plaintiffs. The words published can never be considered as being capable of being understood to refer to the two plaintiffs. On that ground alone, the plaintiffs' claim against the fifth defendant ought to be dismissed.

[12] As to the sixth defendant, it is my considered view that the words published in the sixth defendant's newspaper on 17 March 2001 clearly makes reference to the two plaintiffs and any right thinking reasonable member of the public would understand that the matter about misappropriation of the co-operative's monies implicates the two named plaintiffs.

[13] In considering whether the articles are defamatory to the plaintiffs, it is also trite that the article must be read as a whole and the impugned article must be understood to mean in their natural and ordinary meaning, a meaning in which reasonable men of ordinary intelligence would be likely to understand them.

[14] In *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn. Bhd. & Ors* (1995) 1 LNS 304 His Lordship Richard Malanjun J (as he then was) stated:

> The approach in the construction of the words complained of is to consider the meaning such words would convey to ordinary reasonable person using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw (see *Jones v. Skelton* [1963] 3 All ER 952; *Kemsley v. Foot* [1952] 1 All ER 501; *Rajagopal v. Rahab* [1972] 1 MLJ 45). It is irrelevant what the publisher intended the words complained of to mean (see *Capital & Counties Bank v. Henty* [1882] 7 App Cas 741; *Grubb v. Bristol United Press Ltd* [1963] 1 QB 309, *AJA Peter v. OG Nio & Ors* [1980] 1 MLJ 226). It is also irrelevant what the readers understood the words complained of to mean for the purpose of deciding their ordinary and natural meaning. (See *JB Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334). There is also no necessity for a plaintiff to prove falsity of the words complained of once they are found to be defamatory of him (see *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 31 MLJ 142).
>
> As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally (see *JB Jeyaratnam*).
>
> Words could still be defamatory even if they did not really lower a plaintiff in the estimation of those to whom they were published. The law looks only to its tendency (see *JB Jeyaretnam v. Goh Chok Tong; Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor*).

[15] In *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 50 at p. 58, Mohd Azmi J (as he then was) set out the defamatory test as follows:

A Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type
B of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[16] The Court of Appeal also had occasion to deal with this issue in *Chok Foo Choo v. The China Press Bhd.* [1999] 1 CLJ 461. Speaking for the Court, Gopal Sri Ram JCA (as he then was)
C said:

In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the
D question invites an affirmative response, then the words complained of are defamatory.

[17] And in *Mark Ignatius Uttley v. Wong Kam Hor & Anor* [2002] 8 CLJ 628, Kamalanathan Ratnam J said:

E

As to whether the said meaning is defamatory, the test is to see if such words tend to make reasonable people think the worse of the plaintiff or whether such words would cause him to be shunned or avoided.

F **[18]** In construing the meaning of the words used, the court must do so in the context of the entirety of the contents of the publication. The plaintiff cannot pick and choose parts of the publication which standing alone would be defamatory. This or that sentence may be considered defamatory, but there may be
G other passages which take away the sting (see: *Gatley on Libel and Slander* 9th edn. p. 97).

[19] Applying the test as stated in the authorities set out above, it is my considered view that the publication by the sixth
H defendant is defamatory to the two named plaintiffs. The report implicates the two plaintiffs in the alleged misappropriation of the co-operative's fund. The two plaintiffs were also portrayed as to be closely associated with the co-operative's chairman, E A James who has been suspended by the Board of Directors. It has the
I tendency to expose the plaintiffs to hatred, ridicule or contempt.

The words in the passage would also tend to lower the plaintiffs in the estimation of right thinking members of the society generally and there is every likelihood that those words would cause the plaintiffs to be shunned or avoided. Reading the article as a whole imputes that the plaintiffs are implicated in the issue of misappropriation of the co-operatives fund along with the chairman, one E A James. The sixth defendant's article is in my view defamatory to the two named plaintiffs.

[20] The defence raised by the sixth defendant is one of qualified privilege. It is the contention of the sixth defendant and for that matter the fifth defendant too, that the subject matter reported in their respective newspapers is a matter of public interest. In *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad* [1999] 7 CLJ 32, RK Nathan J in dealing with the defence of qualified privilege stated at p. 41:

> In assessing whether the defence of qualified privilege applies, the Court of Appeal in *Reynolds v. Times Newspaper Ltd* [1998] 3 WLR 863 determined that the following question need to be answered in relation to any individual occasion. Lord Bingham of Cornhill CJ in handing down the judgment of the court at page 899 stated as follows:
>
> 1. Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases, as noted above, may be the general public) to publish the material in question? (We call this the duty test.)
>
> 2. Did those to whom the material was published (which again in appropriate cases may be the general public) have an interest to receive that material? (We call this the interest test.)
>
> 3. Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice? (We call this the circumstantial test.)

[21] In *Adam v. Ward* [1917] AC 309 at p. 334 Lord Atkinson opined:

A

> A privilege occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

B

[22] The Privy Council in *Edward Seaga v. Leslie Harper*, Privy Council Appeal No. 90 of 2006, [2008] UKPC 9 observed the following:

C

> It is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part or the maker to communicate them to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory, so long as they are made without malice, that is to say, honestly and without any indirect or improper motive. It is the occasion on which the statement is made without the privilege, and under the traditional common law doctrine there must be a reciprocity of duty and interest: *Adam v. Ward* [1917] AC 309, 334, per Lord Atkinson.

D

E

[23] It is acknowledged that the three tests proposed by the English Court of Appeal has always been adopted by our courts in determining whether a defence of qualified privilege applies. The report that was published by the defendants in the instant case involves a Cooperative Society which definitely involves the interest of the public. Members of the public have an interest to receive the material published and it is for the general welfare of society. The defendant being a national newspaper has at least the moral duty to disseminate such information to the public and society in general. The learned authors of *Duncan & Neill on Defamation*, 2nd edn (1983) at para 14.04 expressed:

F

G

> From the broad general principle that certain communications should be protected by qualified privilege 'in the general interest of society', the courts have developed the concept that there must exists between the publisher and the publishee some duty or interest in the making of the communication.

H

[24] It is also pertinent to consider whether the defendant has acted reasonably and without malice. Both witnesses called by the defendants were not privy to the reports made in the newspaper and were not responsible for the publication and knows nothing about the cooperative. The evidence however clearly shows that

I

the materials published were well sourced. The article published by the sixth defendant was sourced from the Naib Pengerusi of the Cooperative Society, one Danabal Raju who has lodged a police report on the matter. It is not an unverified information from an unidentified or unofficial source. *Prima facie* it is a reliable information. To quote Charlton J in *Leech v. Independent Newspaper* (2007), EHC 223:

> there is a professional duty on the part of journalists to both seek out information that is of public interest and to impart it to the public and that while that is a matter of for professional skill and training, that it is also a matter of responsibility. And once a public interest is established in terms of the information the subject matter of the article, there is a second test to be met, which is as to whether on the evidence the steps taken to gather and publish the information were responsible and fair. The question may need to be put as to whether a newspaper, or television channel or radio channel, on the evidence behaved fairly and responsibly in gathering and publishing the information.

In the circumstances, I find that the sixth defendant has successfully put up a defence of qualified privilege and hereby dismissed the plaintiffs' claim with costs.